Pfizer, Inc. *and* Rebecca Lynn Olvey Martin *and* Jeffrey J. Rebenstorf. Cases 07–CA–176035 and 10–CA–175850

October 18, 2018

DECISION AND ORDER REMANDING

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On January 10, 2017, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

1. The judge found, applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by promulgating and maintaining a "Mutual Arbitration and Class Waiver Agreement" (the Agreement) that requires job applicants to waive, as a condition of being hired, and employees to waive, as a condition of continued employment, their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S, __138 S.Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at __, 138 S.Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil*, we conclude that the complaint allegation that the Agreement is unlawful based on *Murphy Oil* must be dismissed.

2. The judge also found, applying the "reasonably construe" prong of the Board's decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), that the Respondent violated Section 8(a)(1) by promulgating and maintaining a provision in the Agreement that requires employees to "maintain the confidential nature of the arbitration proceeding and award" (the confidentiality provision). Recently, the Board overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14–17 (2017). Accordingly, we shall sever and remand the allegation that the confidentiality provision is unlawful to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

ORDER

IT IS ORDERED that the complaint allegation that the Respondent violated Section 8(a)(1) by promulgating and maintaining the confidentiality provision is severed and remanded to the administrative law judge for further appropriate proceedings as described above.

IT IS FURTHER ORDERED that the remaining complaint allegations are dismissed.

Dated, Washington, D.C. October 18, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] No party excepts to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by, on two occasions, threatening employees with discharge if they did not sign the "Mutual Arbitration and Class Waiver Agreement."

[2] Chairman Ring is recused and took no part in the consideration of this case.

Joseph Webb, Esq. and *Katherine Chahrouri, Esq.,* for the General Counsel.
Jonathan Fritts, Esq., of Washington, D.C., for the Respondent.
Steven Stastny, Esq., of Birmingham, Alabama, for Charging Party Martin.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on November 4, 2016, in Birmingham, Alabama. After the parties rested, I adjourned the hearing, which then resumed by telephone on November 29, 2016, for oral argument. It then adjourned until December 1, 2016, when it resumed again by conference call and I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

Additional Discussion

As discussed more fully in the bench decision, the Respondent provided each employee with a copy of a document and informed the employee that if he or she continued to work for the Respondent, the employee would be *deemed* to have agreed to its terms. The Respondent labeled the document an "agreement" but I am concerned that if I use that term it might incorrectly suggest that I have reached some conclusion on whether it legally binds the employee. Therefore, I place the word "agreement" in quotes.

As discussed in the bench decision, the Respondent informed its employees that if they continued to work they would be deemed to have accepted the terms of the "agreement." Here, I do not consider whether an employee who continues to perform exactly the same work as in the past thereby gives assent sufficient to create a legally binding contract. Similarly, I do not decide whether sufficient consideration exists to create a binding contract.

In its answer to the complaint, the Respondent avers, as an affirmative defense, that "The Agreement is lawful and enforceable under the Federal Arbitration Act." However, I do not here analyze the facts using the principles of contract law and need not determine the validity of the "agreement" as a contract. Rather, I consider here whether the Respondent's conduct, imposing the "agreement" on employees, is an unlawful attempt to compel employees to waive statutory rights.

Similarly, I need not determine whether the "agreement" is, as claimed in the Respondent's affirmative defense, "enforceable under the Federal Arbitration Act." The injury to employees' Section 7 rights will not begin at some future time when the Respondent attempts to enforce the "agreement" by invoking the Federal Arbitration Act, but already has occurred, when the Respondent notified employees that if they continued to work for the Respondent, they would be deemed to have waived their right to file a joint or collective complaint about working conditions, regardless of whether they sought relief from a judge or an arbitrator. The "agreement" thus began its chilling effect on the exercise of Section 7 rights when the employees learned about it and that chilling effect continues regardless of whether the Respondent ever seeks to enforce the "agreement."

Although I need not reach a conclusion regarding the Respondent's claim that its "agreement" is enforceable under the Federal Arbitration Act, it may be noted that, as the Board stated in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), arbitration is a matter of consent, not coercion.

For reasons discussed in the bench decision, I have concluded that the "agreement" deprived employees of their Section 7 right to engage in concerted activity for their mutual aid or protection. It violated Section 8(a)(1) of the Act, I concluded, because its terms precluded employees from coming together to file a joint grievance concerning one or more working conditions they shared in common. The Respondent argues to the contrary, that employees retained this right because, under the arbitration rules, the arbitrator could consolidate individual grievances raising common issues.

More specifically, the "agreement" stated that arbitration services would be provided by JAMS, a private arbitration service which has issued its own procedural rules which included authorizing the arbitrator to consolidate grievances. This provision, the Respondent contends, distinguishes the present facts from those in *Murphy Oil*, above.

During oral argument, the Respondent made clear that the arbitrator's authority to consolidate grievances was "distinct from class or collective or representative actions which are waived under the agreement." Nonetheless, the Respondent asserts that this procedural rule, allowing the arbitrator to consolidate grievances, suffices to preserve the employees' Section 7 right to act in concert for their mutual aid or protection.

However, I conclude that the employees' right to petition the arbitrator to consolidate their individual grievances is an unsatisfactory substitute for the right to file a joint grievance. The rules do not guarantee that the arbitrator must grant a motion to consolidate. Moreover, the grievances of different employees might well be assigned to different arbitrators.

Considering the fee each employee must pay to file an individual grievance, there is an enormous practical difference between, on the one hand, allowing employees to file a single grievance and split the cost of the filing fee, and, on the other hand, requiring each employee to file a separate expensive grievance and then moving for the arbitrator to consolidate them. This burden clearly, and unlawfully, interferes with the exercise of Section 7 rights.

Moreover, the Respondent's "agreement" is but an old, old serpent in a new skin. It represents simply the latest version of a recurring challenge to a principle implicit in the Act, the principle that employees have a legitimate interest in how their fellow workers are treated and may make common cause with them to improve working conditions. Since its earliest days, the Board has found unlawful various attempts to vitiate this principle. Although these attempts have taken various forms, they all have sought to isolate each employee from the mutual aid and protection afforded by other workers.

[1] The bench decision appears in uncorrected form at pp. 109 through 124 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this certification.

Soon after its establishment, the Board condemned the practice of requiring individual employees to sign "yellow dog" contracts which prohibited union or other concerted activity. See, e.g., *Tidewater Express Lines, Inc.*, 2 NLRB 560 (1937).

Some employers also have sought to keep employees from acting collectively by promulgating unlawful rules prohibiting employees from revealing their wages. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). Obviously, employees cannot come to each other's mutual aid or protection if a rule prevents them from knowing that inequalities exist. Similarly, some employers have tried to isolate employees from each other's assistance by imposing unlawful rules banning discussions of working conditions. *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001). In each instance, the target is the employees' ability to take collective action.

The present conduct, imposing an "agreement" prohibiting employees from filing a joint grievance, causes the same harm as the earlier "yellow dog" contracts, isolating the individual employee from the mutual aid of his or her coworkers. The superficial stripes may vary but the venom is the same.

A procedural rule allowing for the consolidation of individual grievances at the arbitrator's discretion does not create any kind of right to be heard jointly. Even assuming, without proof, that the arbitrator inevitably would grant the employees' motion to consolidate, the significant additional expense of filing an individual grievance for each employee greatly diminishes the Section 7 right of employees to act in concert for their mutual aid or protection. Just as an employer lawfully may not condition employment on the wholesale waiver of Section 7 rights, it may not whittle those rights down gradually, bit by bit.

Accordingly, I reject the argument that the arbitrator's authority to consolidate grievances distinguishes the present case from *Murphy Oil*, above.

For reasons discussed in the bench decision, I also have concluded that the confidentiality provision in the "agreement" violates Section 7 of the Act. During oral argument, the Respondent contended that a disclaimer in the agreement made it lawful:

> Board law requires that rules or policies be given a reasonable reading, and an improper interference with employee rights should not be presumed. That's from *Lutheran Heritage Village-Livonia*, 343 NLRB 646, which we cited in our pre-hearing brief. The agreement in this case contains a clear disclaimer of any interpretation that would interfere with employees' rights under the Act. Again, I'm quoting, "The agreement provides nothing in this confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment." The General Counsel's interpretation of the agreement ignores this disclaimer provision.

In assessing the impact of the disclaimer, I consider how its words reasonably would be understood by a typical employee. After reading the disclaimer such an employee, I conclude, would not believe that employees were allowed to disclose information about an arbitration to the public.

In part, that conclusion flows from the fact that the confidentiality rule and the disclaimer both appear in the same block of text but appear to refer to different matters. The text begins "The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures . . . ." After detailed language concerning when a disclosure *about the arbitration* would be allowed (for example, in connection with a court application for an injunction), the disclaimer language appears.

Significantly, the disclaimer language does not include the word "arbitration," and does not appear to concern information related to an arbitration. Instead, it refers to "protected discussions or activity relating to the workplace." A labor lawyer possibly would construe these words to include discussions about the arbitration process or a particular arbitration, but I do not believe an employee who was not an attorney would do so. To the contrary, the way a nonlawyer reasonably would interpret the confidentiality provision would be to assume that the prohibitory language at the top of the paragraph referred to information about arbitration, and that the later disclaimer language did not concern arbitration but rather everyday work matters.

In other words, an employee reasonably would consider litigation (whether before an arbitrator or judge) to be fundamentally different from what the employee did every day on the job. The disclaimer language itself fosters this impression because, right after stating that the prohibition did not apply to "discussions or activity relating to the workplace" it explained what those words meant by adding "such as discussions of wages, hours, or other terms and conditions of employment." The "such as" did not refer to proceedings before an arbitrator.

Now, a labor lawyer might say, "Wait a minute. The Respondent notified each employee that waiving the right to file a joint, collective or class complaint was a *condition of employment*. The disclaimer preserves the employees' right to discuss conditions of employment so, therefore, it necessarily protects the employees' right to discuss an arbitration." In fact, this reasoning could be formalized into a syllogism: *Employees retain the right to discuss conditions of employment. Waiver of the right to file a joint complaint is a condition of employment. Therefore, employees retain the right to discuss the waiver of the right to file a joint complaint.*

However, I do not believe an employee reasonably would apply the syllogism and conclude that employees had the right to discuss an arbitration. Litigation, whether before a judge or arbitrator, is out of the ordinary to all except the professional participants, and only attorneys, judges, and arbitrators would think of the courtroom as their "workplace."

Moreover, even though the Respondent called its mandated arbitration process a "condition of employment," it is not obvious that the details of a particular arbitration also would constitute "conditions of employment" which employees were free to discuss. To the contrary, the confidentiality provision specifically identified arbitration as the subject which employees were *not* to discuss, with certain explicit exceptions. Thus, the entire thrust of the paragraph was to put arbitration off limits as a subject of discussion. The fact that the "such as" examples did not include arbitration reinforced this impression.

Even assuming that an employee, following the reasoning of

the syllogism, above, saw a possibility that it might be permissible to discuss an arbitration, the express prohibition barring the disclosure of information about arbitration casts a shadow of doubt. Because of this doubt, discussing an arbitration carried a risk of discipline or discharge which would discourage such discussions.

Section 7 protects not only the employees' right to discuss a term or condition of employment among themselves, but also to inform the public about the matter. When two or more employees picket, handbill, go to the news media, or complain to government officials about a term or condition of employment, they are engaged in concerted activity for their mutual aid or protection.

The Respondent has denied them the right to make a concerted complaint in court, a public forum, and instead has required them to use a substitute, a private arbitration service. Employees certainly have the right, when acting in concert, to protest this scheme and to seek the public's support by providing the public with detailed information illustrating its perceived deficiencies.

Stated another way, if employees believe that the arbitration procedure tilts towards one side, or that the decisionmaker is biased or that the arbitrator's decision itself is unfair, they have the right, acting in concert, to inform the public not just that they have been treated unfairly but also to present specific facts supporting their argument that the arbitration scheme, crafted solely by one party to the dispute, falls short of rendering the impartial justice typically available in a court of law. The Respondent, after imposing on employees the condition that they must give up access to the courts and instead use a substitute system of its own design, may not then gag the employees to smother their concerted complaints.

The "agreement" which the Respondent forced on its employees not only deprives them of the right to trial before a judge whose fairness and integrity have been tested by the rigors of an election or through the confirmation process in the United States Senate, but also has limited them solely to an arbitrator furnished by an organization the Respondent itself selected. Thus, the Respondent not only has denied its employees the opportunity to bring their complaints to an elected or appointed judge, but also has prevented them from selecting an arbitrator through the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association.

It is appropriate to take administrative notice that the FMCS is a Federal agency, created by Congress in 1947, which impartially mediates labor disputes and which also provides, on request, lists of qualified arbitrators meeting its standards. Taxpayer funding of this government agency maintains its neutrality.

However, instead of allowing disputes to be resolved by an arbitrator vetted by this government agency, the Respondent forces employees to appear before an arbitrator from a source which the Respondent alone selected. Additionally, although an employee must pay a filing fee, the Respondent alone pays the entire fee of the arbitrator.

Because the Respondent alone selected the source of the arbitrator, because a governmental body such as the United States Senate or the FMCS has not vetted the decision-maker, and because the Respondent pays the arbitrator's fee, employees reasonably might have concerns about the impartiality of the process. Accordingly, the employees have a particularly clear interest in their Section 7 right to complain concertedly to the public about this condition of employment.

Just as the Respondent's "agreement" denies employees the right to make a concerted complaint in court or before an arbitrator, its confidentiality provision denies employees the ability to make a concerted protest to the public about irregularities and unfairness in the arbitration system the Respondent forced them to use. Considering its inherent toxicity to Section 7 rights, I conclude that the confidentiality provision violates Section 8(a)(1) of the Act.

REMEDY

For the reasons stated above and in the bench decision, I have found that the Respondent violated the Act by requiring employees, as a condition of being hired or of continued employment, to waive their right to file a joint, collective, or class action in court while simultaneously requiring them to waive their right to file a joint, collective, or class action grievance or complaint before an arbitrator. Respondent did so by "deeming" that each person who accepted a job offer or continued to work thereby became party to an "agreement" which included those waivers. Likewise, I concluded that the Respondent violated the Act by a confidentiality requirement in that "agreement."

To remedy these violations, I recommend that the Board order the Respondent to rescind these provisions in the "agreement" and to inform each affected employee that those terms had been rescinded. The General Counsel urges that the remedy should be nationwide because the Respondent imposed these arbitration and confidentiality provisions on all, or almost all of its employees nationwide, except for those covered by collective-bargaining agreements. I agree.

Accordingly, the Respondent should post a notice to employees at each location where any of its employees affected by the "agreement" work. However, many of these employees work out of their homes, and the Respondent communicates with them electronically. Therefore, the Respondent must send the notice, by its customary electronic means, to all employees who were notified of the "agreement," or who received information about it, electronically. *J. Picini Flooring*, 356 NLRB 11 (2010).

The General Counsel also seeks an order requiring the Respondent to send copies of the notice to all supervisors within the United States. The Respondent, in an affirmative defense, contends that the General Counsel has no authority to seek, and the Board has no authority to order a remedy which would release supervisors from the terms of the "agreement." Similarly, it disputes that the Board has authority to order a remedy which pertains to others who are not employees as defined by the Act.

Clearly, I do not recommend a remedy for supervisors or others who do not meet the Act's definition of employee. It is not clear how the action the General Counsel seeks, sending notices to supervisors, would effectuate a remedy for those who are employees within the meaning of Section 2(3) of the Act. Therefore, I do not recommend that the Respondent be ordered

to send notices to supervisors.

However, the Act does treat them as employees, and protects, those individuals sincerely seeking employment. *Toering Electric Co.*, 351 NLRB 225 (2007), *NLRB v. Town & Country Electric*, 516 U.S. 85, 116 S.Ct. 450 (1995). The Respondent's "agreement" applied both to job applicants and to current employees, and the Respondent treated acceptance of employment as assent. Therefore, I recommend that the Board order the Respondent to post the notice to employees in all places where Respondent provides or receives job applications and/or interviews job applicants.

CONCLUSIONS OF LAW

1. The Respondent, Pfizer, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by requiring job applicants to waive, as a condition of being hired, and by requiring its employees to waive, as a condition of continued employment, their Section 7 right to file joint, collective, or class complaints, grievances or lawsuits against it in any forum, whether judicial or arbitral.

3. The Employer violated Section 7 of the Act by imposing on job applicants and employees, as a condition of hire or of continued employment, a requirement that they could not disclose, and must keep confidential, information about an arbitration process which the Respondent required them to use, and information about individual arbitrations, thereby subjecting them to possible discipline or discharge if they made a concerted public protest concerning these terms and conditions of employment.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not engage in the unfair labor practices alleged in the complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Pfizer, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring job applicants, as a condition of hire, and requiring employees, as a condition of continued employment, to waive their right, acting together for their mutual aid or protection, to file joint, collective, or class complaints, grievances, or legal actions against the Respondent in any forum, whether judicial or arbitral.

(b) Imposing on employees a confidentiality provision which precludes them, acting in concert, from disclosing any of their terms or conditions of employment, including information about the arbitration process they must follow or about individual arbitrations, or which precludes them from discussing any of their terms and conditions of employment, or which subjects them to possible disciplinary action or discharge if they disclose or discuss any terms and conditions of employment.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind those terms of the "agreement" which require employees to waive their right, acting in concert, to file a joint, collective, or class complaint, grievance, or legal action.

(b) Rescind the confidentiality provision which prohibits employees from disclosing or discussing the arbitration process they must use and which prohibits them from disclosing or discussing any information concerning that process or concerning an individual arbitration, or which subjects them to possible disciplinary action or discharge if they engage in such disclosure or discussion.

(c) Notify all employees who had received notice of the restrictions described in paragraphs (a) and (b) above that it has rescinded these restrictions.

(d) If it has disciplined or discharged any employee for violating any of the restrictions described above in paragraphs (a) and (b), rescind any such disciplinary action, make whole the affected employee or employees for all loses suffered because of such disciplinary action, and restore the status quo which existed before such disciplinary action, which remedial action shall include, as necessary, reinstating any employee discharged for violating these provisions, making whole all employees who suffered losses because of such discipline or discharge, and removing from its personnel files and other records all references to such Post at all of its facilities in the United States where any employee affected by the restrictions described above in paragraphs (a) or (b) works, and within each such facility at all other places where notices customarily are posted, and at all locations where job applicants seek or are interviewed for employment, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Additionally, Respondent shall transmit copies of the notice electronically to all employees who received, by electronic means, information concerning the restrictions described above in paragraphs (a) and (b). *J. Picini Flooring*, 356 NLRB

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such closed facility or facilities at any time since May 5, 2016. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: Washington, D.C. January 10, 2017

APPENDIX A

BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The Respondent imposed, as a condition of employment, an arbitration procedure which it required employees to use, waiving their rights to bring a collective lawsuit against the Respondent and their rights to bring a collective or class action grievance against the Respondent. I find that the Respondent thereby violated Section 8(a)(1) of the Act.

Procedural History

This case began on May 9, 2016, when Charging Party Rebecca Lynn Olvey Martin filed an unfair labor practice charge against the Respondent, Pfizer, Inc. This charge was docketed as Case 10–CA–175850. She amended this charge on June 22, 2016 and on July 21, 2016.

On May 11, 2016, Charging Party Jeffrey J. Rebenstorf filed a charge against the Respondent which was docketed as Case 07–CA–176035.

On August 15, 2016, the Regional Director for Region 10 of the Board issued an Order consolidating cases, consolidated complaint and notice of hearing. The Respondent filed a timely answer.

On November 4, 2016, a hearing opened before me in Birmingham, Alabama. After the parties presented evidence, I adjourned the hearing. It resumed on November 29, 2016, by telephone conference call so that counsel could present oral argument. I then adjourned the hearing until today, December 1, 2016, when it resumed by conference call for the issuance of this bench decision.

Admitted Allegations

In its answer to the complaint, and in a written stipulation, the Respondent admitted certain allegations. Based on those admissions, I make the following findings.

The unfair labor practice charges and amended charges were filed and served as alleged in complaint paragraphs 1(a) through 1(d). In making these findings, I note that the Respondent's answer admits receipt of the charges but avers a lack of knowledge concerning the dates on which the charges were filed. In view of the dates on the charges and the affidavits of service, and in view of the presumption of administrative regularity and the absence of any evidence contradicting the dates on those documents, I conclude that the charges and amended charges were filed as alleged.

Further, I find that the Respondent is a Delaware corporation engaged in the manufacture and nonretail sale of pharmaceuticals and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Additionally, I conclude that the Respondent meets the Board's statutory and discretionary jurisdictional standards.

The Respondent has admitted, and I find, that its District Business Manager, Greg Jones, is its supervisor and agent within the meaning of Section 2(11) and 2(13) of the Act, respectively.

Complaint Paragraph 6 alleges, the Respondent has admitted and I find that about May 5, 2016, it promulgated and since then has maintained a nationwide mandatory arbitration policy. The Respondent has stipulated to the text of this policy and portions of it will be quoted later in this decision in connection with specific complaint allegations.

Contested Allegations

The Mandatory Arbitration Agreement

The Respondent has admitted that on about May 5, 2016, it promulgated a mandatory arbitration agreement. However, it denies that this action violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 9.

The Respondent stipulated, and I find, that this agreement includes the following language:

> a. Waiver of Class Collective, and Representative Actions:
>
> To the maximum extent permitted by applicable law, the parties agree that no Covered Claims may be initiated or maintained on a class action, collective action, or representative action basis either in court or arbitration. This means that neither party may serve or participate in a class, collective, or representative action involving Covered Claims either in court or in arbitration. In addition, neither you nor the Company may participate as a plaintiff or claimant in a class, collective or representative action to the extent that the action asserts Covered Claims against you or the Company. Nothing in this Agreement will preclude you or the Company from testifying or providing information in a class action, collective action, or representative action.

Based on the Respondent's stipulations, I further find that with the exception of employees covered by a collective-bargaining agreement and those employed by a small subsidiary, the Respondent's Mutual Arbitration and Class Waiver Agreement applies to all of the Respondent's employees in the United States.

The document purports to prohibit employees from filing actions in court and mandates arbitration of a broad range of work-related disputes. The document excludes a few types of claims, notably those involving workers' compensation, unemployment compensation, matters covered by the Employee Retirement Income Security Act of 1974, and those "subject to the exclusive jurisdiction of the National Labor Relations Board" among others. Except for those specifically excluded, the document requires arbitration of

> all disputes, claims, complaints, or controversies ("Claims") that you have now or at any time in the future may have against Pfizer and/or any of its parents, subsidiaries, affiliates,

> predecessors, successors, assigns, current and former officers, directors, employees, and/or those acting as an agent of the Company (which make up the definition of "Company"), or that the Company has now or at any time in the future may have against you, including claims relating to breach of contract, tort claims, wrongful discharge, discrimination and/or harassment claims, retaliation claims, claims for overtime, wages, leaves, paid time off, sick days, compensation, penalties or restitution, including but not limited to claims under the Fair Labor Standards Act ("FLSA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Worker Adjustment and Retraining Notification Act ("WARN"), the Equal Pay Act ("EPA"), the Americans With Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), and any other claim under any federal, state, or local statute, constitution, regulation, rule, ordinance, or common law, arising out of and/or directly or indirectly related to your application for employment with the Company, and/or your employment with the Company, and/or the terms and conditions of your employment with the Company, and/or termination of your employment with the Company. . .

Clearly, this document establishes arbitration as a means of resolving not only work-related disputes which otherwise might be the subject of a lawsuit but also many other grievances which almost certainly would not wind up in court. I conclude that the Respondent has established a general procedure for resolving employee grievances. On its Frequently Asked Questions sheet, the Respondent explained that an employee could initiate this procedure by filing a "Demand for Arbitration" with a dispute resolution company, JAMS. The sheet advised employees that they could obtain the "Demand for Arbitration" form from the JAMS website, and gave the URL address of that website.

In sum, the Respondent created a grievance resolution procedure to be used by employees who were not represented by a union. However, there is one significant difference between this grievance process and those typically found in collective-bargaining agreements. To use this process, the employee must pay JAMS a filing fee of $250. Additionally, and unlike typical collective-bargaining agreements, the Respondent pays the arbitrator's entire fee.

The Respondent calls this document the "Mutual Arbitration and Class Waiver Agreement" and I will refer to it here as the "agreement." However, by using that term, I do not mean to imply that there was, in fact, an agreement in the usual sense of the word "agreement."

The Respondent did not require an employee to sign any document or to signify assent to the terms of the "Agreement" with a handshake, a verbal "I agree" or any other action except to continue working for the Respondent. If the employee continued to perform his or her job, as before, the Respondent deemed that the employee agreed to be bound by the terms of the document. Thus, the document included this language:

> You understand that your acknowledgement of this Agreement is not required for the Agreement to be enforced. If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and you will be deemed to have consented to, ratified and accepted this Agreement through your acceptance of and/or continued employment with the Company.

The Respondent provided employees with a "Frequently Asked Questions" sheet which explained this language as follows:

> 4. Do I have to agree to this?
>
> The Arbitration Agreement is a condition of continued employment with the Company. If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, it will be a contractual agreement that binds both you and the Company.

The Frequently Asked Questions sheet also made clear that an employee could not change the terms:

> 5. Can I change any parts of the agreement that I do not like?
>
> No, you cannot change any of the terms of the Arbitration Agreement.

This take-it-or-leave language has the flavor of what the law calls a "contract of adhesion" but the word "contract" gives me pause. However, I do not have to decide whether the document meets any definition of "contract" or "agreement" and similarly do not have to decide the extent to which the document is legally enforceable.

Rather, my task is to determine whether the Respondent, by imposing this condition on its employees, thereby interfered with, restrained or coerced them in the exercise of rights guaranteed in Section 7 of the Act, which gives employees the following rights:

> To form, join, or assist labor organizations;
> To bargain collectively through representatives of their own choosing;
> To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;
> To refrain from any or all such activities.

See 29 U.S.C. Section 157. Of particular significance here is the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This phrase covers many different types of action, including activity unimagined when Congress passed the Act in 1935. For example, it now includes two or more employees discussing their terms of employment on social media such as Facebook. *Bettie Page Clothing*, 361 NLRB No. 79 (2014); *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 368 (2012).

To fall within the definition, the activity typically must involve two or more employees and must pertain to employees' wages, hours, or working conditions. The Act protects two or more employees complaining about their working conditions, *Crowne Plaza Laguardia*, 357 NLRB 1097 (2011), to their employer's stockholder's meeting, *Englehard Corp.*, 342 NLRB No. 5 (2004), at a state unemployment compensation hearing, *Loyalhanna Care Center*, 332 NLRB 933 (2000), and to members of the public, including their employer's custom-

ers, *Compuware Corp. v. NLRB*, 134 F.3d 1285 (6th Cir. 1998).

For obvious reasons, an employer may not require an employee to waive a Section 7 right as a condition of employment. For example, if an employer lawfully could make a job applicant promise not to cross a picket line, Section 7 rights would evaporate. Employers routinely would require job applicants to agree to such a waiver before hire and would require employees to agree to the waiver if they wanted to stay employed. In that event, Section 7 rights would exist in the statute books but not in the workplace.

So, the issue to be decided here concerns whether the Respondent's mandatory arbitration "agreement" forces employees, as a condition of continued employment, to waive any right granted by Section 7 of the Act. If so, the Respondent has interfered with, restrained or coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act.

The General Counsel alleges a violation because the agreement prohibits employees from filing any collective grievance. The Respondent's FAQ told employees:

> By agreeing to the Arbitration Agreement through continuing your employment with Pfizer, you are giving up the right to bring employment-related claims covered by the Agreement against Pfizer in a court of law. Instead, you are agreeing to arbitrate those claims before a neutral arbitrator. You are also agreeing to bring those claims on an individual basis and not on a class action, collective action, or representative action basis.

Thus, Respondent's explanation makes clear that the prohibition on filing a lawsuit and the prohibition on collective action are separate and distinct. The "agreement" forbids employees from filing a concerted grievance, that is, a "Demand for Arbitration" signed by more than one employee or seeking relief for more than one employee. Thus, the FAQ specifically informs employees

> The Arbitration Agreement states that you and the Company agree to arbitrate individual covered employment disputes between you and the Company on a non-class, non-collective, and non-representative basis.

The words "non-collective and non-representative" raise a red flag because Section 7 specifically protects employees' concerted action for their mutual aid and protection. Indeed, the entire National Labor Relations Act is grounded in the principle that employees have the right to act collectively. It does not matter whether employees have gone through the formality of forming a union. The Act covers employees even if they are acting in concert informally, if such activity is for their mutual aid or protection.

The Respondent argues that this case is not governed by the Boards decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). Contrary to the Respondent, I believe that this case is on point and consistent with the conclusions I reach here. However, one important difference between *Murphy Oil* and the present case should be noted.

In *Murphy Oil*, much of the Board's analysis concerned employees' right to file a class action lawsuit in Federal court. Here, I focus on the employees' right to file a grievance, that is, a Demand for Arbitration, in which two are more employees are co-grievants, or which seeks relief on behalf of more than one employee.

To the extent that the Respondent's agreement prohibits two or more employees from acting together to file a lawsuit in court, or prohibits a lawsuit seeking relief on behalf of one employee, I certainly find that prohibition unlawful for the reasons stated by the Board in *Murphy Oil*. However, that situation seems unlikely to arise, in part because many, perhaps most work-related disputes do not warrant the expenses involved in bringing a lawsuit.

But, as the Respondent's FAQ points out, arbitration typically entails lower costs. Therefore, employees likely will bring before the arbitrator issues that would not justify the expense of a lawsuit.

Two or more employees have the right to bring their work-related complaints to a supervisor, to a manager, to the human resources department or an ombudsman, to the chief executive officer, to stockholders, to government agencies, and to the public. Likewise, when an employer establishes an arbitration procedure, it cannot lawfully require employees to give up the right to concertedly seek relief before the arbitrator.

Any other conclusion would ignore the realities of the workplace. An employee typically complains about a condition of employment which affects coworkers as well. Requiring each employee to pay $250 to file a grievance, and not allowing them to act concertedly in filing a grievance, sharing the cost, imposes a substantial burden on employees seeking redress.

The lawfulness of the "agreement" does not depend on whether the procedure it establishes is efficient or inefficient. However, it may be noted that employees often engage in concerted activity because they all share the same work-related grievance. Requiring each employee to go alone, seeking relief only for himself or herself, increases the risk that similarly situated employees will be treated differently.

In any event, the Respondent's "agreement" prohibits employees from going together to the arbitrator with their common grievance and therefore interferes with their Section 7 right to act in concert for their mutual aid and protection. Therefore, I conclude that the Respondent's "agreement" violates Section 8(a)(1) of the Act.

The Confidentiality Provision

The "agreement" includes a confidentiality provision which the complaint alleges to be a violation of Section 8(a)(1). The provision states, in part, as follows:

> The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award, except as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties. This provision shall not prevent either party from communicating with witnesses or seeking ev-

idence to assist in arbitrating the proceeding.

Under Board precedent, if employees reasonably would understand a work rule to prohibit them from discussing wages or other terms and conditions with each other, the rule interferes with the employees' exercise of Section 7 rights. Thus, the Board has found unlawful work rules which prohibit the discussion of wages. See *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989), and *Waco, Inc.*, 273 NLRB 746 (1984). Likewise. the Board has found unlawful a rule banning employees from discussing sexual harassment. *Phoenix Transit System*, 337 NLRB 510 (2002). The same principle applies to employee discussions of other terms and conditions of employment.

In determining whether a work rule violates the Act, the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824 (1998).

Here, the Respondent argues that the rule does not violate the Act because it includes language which clearly informs employees that they may engage in protected activity. One such provision states:

> nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.

Another provision states:

> Nothing in this Agreement will preclude you or the Company from testifying or providing information in a class action, collective action, or representative action.

Still another provision informs employees that nothing in the agreement prohibits them from filing charges with the Board or other government agencies.

These provisions clearly inform employees that they may engage in some of the activities protected by Section 7. However, they do not cover all protected activities.

Section 7 gives employees the right, acting in concert, to appeal to the public. Picket signs provide one iconic example and handbills another. Typically, they proclaim that the employees are treated unfairly and often go on to describe the perceived unfairness. Such picketing and handbilling brings pressure to bear on the employer because members of the public may stop purchasing the employer's product.

Employees, acting in concert, have the right to call the public's attention to any condition of employment the employees consider unsatisfactory. The Respondent's mandatory arbitration "agreement" is itself a condition of employment. Indeed, the parties stipulated that Respondent's employees are bound to the "agreement" as a condition of employment.

Accordingly, the employees have the right to call the public's attention to whatever they consider unfair about the "agreement" or the procedure it established. If they believe the arbitration or the arbitrator acted unfairly, they have the right, acting in concert, to tell whoever will listen, whether it be a governmental body or the public itself. And they have the right, acting in concert, to provide specific information.

The confidentiality "agreement" prohibits disclosure of information about the arbitration proceeding except for the limited exceptions already mentioned. Therefore, I conclude that it prohibits employees from providing information to the public about an arbitration proceeding, which is a condition of employment. Therefore, I conclude that it interferes with the exercise of Section 7 rights, and thereby violates Section 8(a)(1) of the Act.

Alleged 8(a)(1) Statements

Complaint paragraph 8(a) alleges that about May 9, 2016, the Respondent, by District Business Manager Gary Jones, in a WebX Team Meeting conducted via telephone, told employees that assent to the mandatory arbitration agreement was required in order to continue their employment.

Complaint paragraph 8(b) alleges that about May 26, 2015, Jones, in a phone call, threatened employees with discharge if they did not sign the mandatory arbitration agreement.

The Respondent denies these allegations and also the allegation that it thereby violated Section 8(a)(1) of the Act.

Based on my observations of the witnesses, I credit Jones, who denied the allegations. Accordingly, I find that the Respondent did not violate the Act in the manner alleged in complaint paragraphs 8(a) and (b).

However, for the reasons already stated, I do conclude that the Respondent violated the Act by imposing the arbitration agreement as a condition of employment.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will include provisions relating to the findings of fact, conclusions of law, remedy, order, and notice. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

I appreciate the professionalism and hospital which all parties and counsel displayed during the hearing. The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT require our employees to waive, or inform our employees that they have waived, their right to file joint, collective or class complaints, grievances or legal actions against us.

WE WILL NOT prohibit our employees from discussing any term or condition of their employment, including information about the arbitration process or about an arbitration.

WE WILL NOT prohibit our employees, acting in concert, from disclosing information about the arbitration process, about an arbitration, or about any other term or condition of employment.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the prohibition against filing a joint, collective or class complaint, grievance or legal action against us.

WE WILL rescind all prohibitions against discussing or disclosing information about the arbitration process, an arbitration, or about any other term or condition of employment.

WE WILL, if any employee has been disciplined or discharged because of these now-rescinded policies, take all actions necessary to revoke that discipline and restore the status quo, including, when necessary, reinstatement, making whole each such employee for all losses suffered because of the disciplinary action, and removal of references to each such disciplinary action from our files.

PFIZER, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-175850 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.